SOH POH SHENG v. MALAYAN BANKING BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
ZALEHA YUSOF JCA
KAMARDIN HASHIM JCA
[APPEAL NO: J-02(IM)-444-03-2016]
25 JANUARY 2017

CIVIL PROCEDURE: *Judgments and orders – Judgment in default ('JID') – Enforcement of – Leave to enforce JID after 12 years – Whether application for leave to enforce JID time barred – Application for nunc pro tunc order – Whether required – Limitation Act 1953, s. 6(3)*

LIMITATION: *Enforcement of judgment – Bankruptcy proceedings – Leave to enforce judgment in default after 12 years – Whether application for leave to enforce JID time barred – Limitation Act 1953, s. 6(3)*

On 26 September 2001, a judgment in default ('JID') was entered against Soh Poh Sheng ('the second defendant'). Based on the JID, Malayan Banking Berhad, ('the plaintiff') initiated a bankruptcy proceeding against the second defendant ('first bankruptcy proceeding'). The first bankruptcy proceeding was initiated within six years from the date of the JID. A bankruptcy search revealed that the second defendant was adjudged bankrupt on 24 September 2003. Hence, the plaintiff withdrew the first bankruptcy proceeding. On 9 March 2006, the plaintiff filed a proof of debt to claim the amount owing by the second defendant. However, in 2007, the plaintiff discovered that the receiving order and adjudication order ('ROAO') dated 24 September 2003 against the second defendant was rescinded and annulled on 23 September 2004. From 2002 to 2007, there were several negotiations for the settlement of the debt due and owing between, *inter alia*, the second defendant and the plaintiff. However, a final settlement was not reached between the plaintiff and the second defendant. On 20 August 2013, the plaintiff initiated another bankruptcy proceeding against the second defendant ('the second bankruptcy proceeding'). On 14 January 2015, the second defendant's application for an extension of time to set aside the JID was dismissed by the court. As there was no appeal by the second defendant, the JID was therefore final. The plaintiff, relying on the case of *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* ('*Dr Shamsul Bahar's* case') filed an application for *nunc pro tunc vide* encl. 21R for leave to enforce the JID against the second defendant *vide* the second bankruptcy proceeding, in order to avoid the bankruptcy proceedings being rendered void, as no prior leave was obtained to execute the judgment that was obtained in 2001. On 30 July 2015, the court allowed the plaintiff's application ('order'). The second defendant averred that the plaintiff's application for leave to enforce the JID was time barred as it was filed beyond the statutory limit of 12 years pursuant to s. 6(3) of the Limitation Act 1953 ('Limitation Act'). Therefore, the second defendant, *vide* encl. 26R filed an application to set aside the order. The Judicial

Commissioner ('JC') dismissed the second defendant's application. Hence, the present appeal. The issues that arose for consideration, *inter alia*, were (i) whether the plaintiff was caught by the Limitation Act; and (ii) whether there was any requirement for the plaintiff to make a *nunc pro tunc* application.

Held (dismissing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The plaintiff was within time as it had acted after 11 years and ten months from the date of judgment in 2001. As such, the plaintiff was not caught by the limitation of 12 years. As regards to the *nunc pro tunc* application, in the circumstances of this case, there was no need for the plaintiff to have so applied for retrospective leave, in order to be in compliance with the apex court ruling on prior leave requirement that was pronounced in *Dr Shamsul Bahar*'s case. The ruling in *Dr Shamsul Bahar*'s case was prospective in effect. (paras 19 & 20)

(2) There was no pending appeal pertaining to this case. It was a case which had, for all intents and purposes been finally disposed of. What was left was the execution of the final judgment. As such, this case was not affected in anyway by the prospective ruling in *Dr Shamsul Bahar*'s case. In other words, no prior leave was needed for it to initiate execution proceedings against the second defendant although six years had gone past after judgment was obtained against the second defendant. (para 24)

(3) The *nunc pro tunc* order was apparently sought in an abundance of caution. It was clear that when the bankruptcy proceedings were initiated in 2013, it was within the 12 years allowed under the law on limitation and under the prevailing legal regime then in force, that no leave was required for execution proceedings of a judgment that was obtained against the second defendant more than six years before execution proceedings were initiated against him. There were no cogent reasons as to why the decision of JC ought to be disturbed. If indeed the JC had erred, he had erred on the side of caution and there was no miscarriage of justice being occasioned against the second defendant. (para 26)

Bahasa Malaysia *Headnotes*

Pada 26 September 2001, satu penghakiman ingkar ('JID') dimasukkan terhadap Soh Poh Sheng ('defendan kedua'). Berdasarkan JID, Malayan Banking Berhad, ('plaintif') memulakan prosiding kebankrapan terhadap defendan kedua ('prosiding kebankrapan pertama'). Prosiding kebankrapan pertama dimulakan dalam tempoh enam tahun dari tarikh JID. Satu carian kebankrapan mendapati bahawa defendan kedua diisytiharkan bankrap pada 24 September 2003. Oleh itu, plaintif menarik balik prosiding kebankrapan pertama. Pada 9 Mac 2006, plaintif memfailkan bukti keberhutangan untuk menuntut jumlah yang terhutang oleh defendan kedua. Walau bagaimanapun, pada tahun 2007, plaintif mendapati bahawa perintah penerimaan dan perintah penghukuman ('ROAO') bertarikh 24 September 2003 terhadap

defendan kedua dibatalkan pada 23 September 2004. Dari tahun 2002 hingga 2007, terdapat beberapa rundingan untuk menyelesaikan urusan hutang yang harus dibayar dan terhutang, antara lain, defendan kedua dengan plaintif. Walau bagaimanapun, penyelesaian muktamad tidak tercapai antara plaintif dan defendan kedua. Pada 20 Ogos 2013, plaintif memulakan prosiding kebankrapan terhadap defendan kedua ('prosiding kebankrapan kedua'). Pada 14 Januari 2015, permohonan lanjutan masa oleh defendan kedua untuk mengetepikan JID ditolak oleh mahkamah. Oleh kerana tiada rayuan oleh defendan kedua, JID dijadikan muktamad. Plaintif, bersandarkan kes *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* (*'Dr Shamsul Bahar'*) memfailkan permohonan *nunc pro tunc* melalui lampiran 21R bagi kebenaran untuk menguatkuasakan JID terhadap defendan kedua malalui prosiding kebankrapan kedua, untuk mengelakkan prosiding kebankrapan menjadi tidak sah, kerana tidak ada kebenaran terlebih dahulu diperolehi untuk melaksanakan penghakiman yang diperolehi pada tahun 2001. Pada 30 Julai 2015, mahkamah membenarkan permohonan plaintif ('perintah'). Defendan kedua menegaskan bahawa permohonan plaintif bagi kebenaran untuk menguatkuasakan JID terhad oleh masa kerana ia difailkan melebihi had berkanun 12 tahun menurut s. 6(3) Akta Had Masa 1953 ('Akta Had Masa'). Oleh itu, defendan kedua, melalui lampiran 26R memfailkan permohonan untuk mengetepikan perintah. Pesuruhjaya Kehakiman ('JC') menolak permohonan defendan kedua. Oleh itu rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada plaintif dihadkan oleh Akta Had Masa; dan (ii) sama ada terdapat apa-apa keperluan untuk plaintif membuat permohonan *nunc pro tunc*.

Diputuskan (menolak rayuan dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Plaintif masih terangkum dalam had masa kerana bertindak selepas 11 tahun sepuluh bulan dari tarikh penghakiman pada tahun 2001. Oleh itu, plaintif tidak terhad oleh tempoh 12 tahun. Berkenaan permohonan *nunc pro tunc*, dalam hal keadaan kes ini, tidak ada keperluan untuk plaintif memohon kebenaran retrospektif, untuk mematuhi keputusan Mahkamah Persekutuan mengenai keperluan memohon kebenaran seperti yang diputuskan dalam kes *Dr Shamsul Bahar*. Keputusan dalam kes *Dr Shamsul Bahar* bersifat prospektif.

(2) Tidak ada rayuan yang belum diselesaikan berkaitan kes ini. Ia adalah kes yang telah dilupuskan. Apa yang tinggal adalah pelaksanaan penghakiman akhir. Oleh itu, kes ini tidak terjejas oleh perintah prospektif dalam kes *Dr Shamsul Bahar*. Dalam erti kata lain, kebenaran terlebih dahulu tidak diperlukan untuk memulakan prosiding pelaksanaan terhadap defendan kedua walaupun enam tahun telah berlalu selepas penghakiman diperolehi terhadap defendan kedua.

(3) Perintah *nunc pro tunc* dipohon secara berhati-hati. Adalah jelas bahawa apabila prosiding kebankrapan dimulakan pada tahun 2013, ia adalah dalam tempoh 12 tahun yang dibenarkan di bawah undang-undang

mengenai had dan di bawah rejim undang-undang yang berkuat kuasa ketika itu, bahawa tiada kebenaran diperlukan bagi prosiding pelaksanaan penghakiman yang diperolehi terhadap defendan kedua lebih daripada enam tahun sebelum prosiding pelaksanaan dimulakan terhadapnya. Tidak ada sebab-sebab yang meyakinkan mengapa keputusan JC patut diganggu. Jika JC terkhilaf, beliau terkhilaf pada keperluan berwaspada dan tiada salah laksana keadilan dilakukan terhadap defendan kedua.

Case(s) referred to:

Ambank (M) Bhd v. Tan Tem Son & Another Appeal [2013] 3 CLJ 317 FC ***(refd)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(not foll)***

National Westminster Bank plc v. Spectrum Plus Limited [2005] UKHL 41 ***(foll)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(foll)***

Legislation referred to:

Companies Act 1965, s. 236(2)(a)

Limitation Act 1953, s. 6(3)

Rules of Court 2012, O. 46 r. 2(1)(a)

Rules of the High Court 1980, O. 46 r. 2

For the appellant - Rajan Navaratnam, James Au & Sharifah Munirah; M/s Rajan Navaratnam

For the respondent - Hoi Jack S'ng; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: 22-278-2001 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Abang Iskandar JCA:

Background Of The Case

[1] On 26 September 2001, a judgment in default ("JID") was entered against Soh Poh Sheng ("the second defendant").

[2] Based on the JID, Malayan Banking Berhad, ("the plaintiff") initiated a bankruptcy proceeding against the second defendant on 31 July 2002 *vide* Johor Bahru High Court Bankruptcy No. 29-3392-2002 ("first bankruptcy proceedings").

[3] The first bankruptcy proceedings were initiated within six years from the date of the JID.

[4] A bankruptcy search revealed that the second defendant was adjudged bankrupt by Mayban Finance Berhad on 24 September 2003. Hence, the plaintiff withdrew the first bankruptcy proceedings.

[5] On 9 March 2006, the plaintiff then filed a proof of debt to claim the amount owing by the second defendant.

[6] In 2007, the plaintiff discovered that the receiving order and adjudication order ("ROAO") dated 24 September 2003 against the second defendant were rescinded and annulled on 23 September 2004. A

[7] From 2002 to 2007, there were several negotiations for settlement of the debt due and owing between the first and the second defendants with the plaintiff. However, a final settlement was not reached between the plaintiff and the second defendant. B

[8] On 20 August 2013, the plaintiff initiated a bankruptcy proceedings against the second defendant *vide* Johor Bahru High Court Bankruptcy No. 29-3049-08-2013 ("the second bankruptcy proceedings"). C

[9] On 14 January 2015, the second defendant's application for an extension of time to set aside the JID was dismissed by the court. As there was no appeal by the second defendant, the JID is therefore final.

[10] The plaintiff filed an application for *nunc pro tunc vide* encl. 21R for leave to enforce the JID against the second defendant *vide* the second bankruptcy proceedings. D

[11] On 30 July 2015, the court allowed the plaintiff's application in encl. 21R.

[12] The second defendant averred that the plaintiff's application for leave to enforce the JID was time-barred as it was filed beyond the statutory limit of 12 years pursuant to s. 6(3) of the Limitation Act 1953. Therefore, the second defendant, *vide* encl. 26R filed an application to set aside the order dated 30 July 2015. E

[13] The Judicial Commissioner ("JC") dismissed the second defendant's application with costs of RM4,000. Thus this appeal by the second defendant to the Court of Appeal. F

The Appeal

[14] In this appeal, the second defendant submitted before us, the following issues, namely: G

(a) there is no provision in law for the plaintiff to make leave application for *nunc pro tunc* under O. 46 r. 2(1)(a) of the Rules of Court 2012 as it does not provide for an application to be made either *nunc pro tunc* or for retrospective leave. Instead, it is only applicable prior to issuance of a writ for execution and not after a writ for execution has been issued. H

(b) the application for leave was time-barred as it was made after 12 years; and

(c) the plaintiff cannot rely on s. 236(2)(a) of the Companies Act 1965 as the second defendant is an individual and hence only Bankruptcy Act 1967 applies. However, the Bankruptcy Act 1967 does not provide for leave to be granted *nunc pro tunc* under any circumstances before an adjudicating order is made. I

[15] The plaintiff on the other hand contended that the catalyst for applying for *nunc pro tunc* leave was a change in law. At the time the plaintiff commenced the bankruptcy proceedings, O. 46 r. 2(1)(a) was not applicable to bankruptcy proceedings. Thus, no leave was first obtained despite six years have lapsed since the date of judgment. That was the state of the law as enunciated in the apex court's decision in the case of *AmBank (M) Bhd v. Tan Tem Son & Another Appeal* [2013] 3 CLJ 317 where it was held that a bankruptcy action does not fall within the ambit of a writ of execution within the meaning of O. 46 r. 2 of the Rules of the High Court 1980. Premised on that ruling, the issue of whether a judgment creditor was required to obtain prior leave of court before it could begin a bankruptcy proceeding based on a final judgment which was obtained more than six years prior did not therefore arise. In short, no such leave was necessary to be obtained by the judgment creditor.

[16] However, the law had been substantially changed since 2015. While the bankruptcy proceedings were ongoing, the Federal Court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1 ("*Dr Shamsul Bahar* case") decided that the leave under O. 46 r. 2(1)(a) is now required before a plaintiff can enforce a judgment *via* bankruptcy proceedings where more than six years have lapsed since the date of the judgment.

[17] So, in order to avoid the bankruptcy proceedings being rendered void, as no prior leave is obtained, the plaintiff had thus filed this application. It was allowed by the learned JC sitting in the High Court at Johor Bahru. In consequence thereof, a *nunc pro tunc* order was granted giving leave to the plaintiff as judgment creditor to execute the judgment that was obtained in 2001 (more than six years before the application was made by the plaintiff).

[18] We would deal with the issue of whether this action by the plaintiff was caught by the embargo set out by the Limitation Act 1953 as it was alleged by the second defendant herein that the plaintiff had so acted after 12 years had lapsed from the time the judgment was first obtained against the second defendant by the plaintiff. For this matter, we must look at the chronology of the relevant events for its historical journey.

[19] Premised on that scrutiny, it was clear to us that the plaintiff was not caught by the limitation of 12 years. It had been shown to us that it was within time as it had acted after 11 years and 10 months from the date of judgment in 2001. As such, the contention that this action was taken up after 12 years had elapsed so as to trigger the limitation against the plaintiff could not, with respect, be sustained as it lacked the necessary factual foundation in order to succeed.

[20] The plaintiff had applied for leave, *nunc pro tunc*. A Latin term, pronounced as *nuhnk proh tuhnk*, literally means "now for then" in the English language. In legal terms, it means changing back to an earlier date of an order, judgment or filing of a document. As regards to this *nunc pro tunc*

application, in the circumstances of this case, we were of the view that, in fact, there was no need for the plaintiff to have so applied for retrospective leave, in order to be in compliance with the apex court ruling on prior leave requirement that was pronounced in the *Dr Shamsul Bahar* case *(supra)*. We had so ruled because the ruling in *Dr Shamsul Bahar* case *(supra)* was prospective in effect. Indeed, a reading of the said apex court's decision did not suggest that it was meant to be retrospective in effect. In other words, it seeks to operate prospectively, meaning to say that its decision is only applicable to cases which shall arise after the date of pronouncement of its decision by the apex court. It is used in opposition to a retrospective law and does not in any way interfere with what has already passed.

[21] If indeed it was to be applicable retrospectively, it could only be so applied in a very limited and circumscribed circumstance. We found support for holding such a view premised on few decided cases of high authority.

[22] First, we would refer to the speech by Lord Nicholls of Birkenhead, in the English House of Lords decision in the case of *National Westminster Bank plc v. Spectrum Plus Limited* [2005] UKHL 41, where the learned Law Lord had said:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular disputes are concerned.
>
> …
>
> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences.
>
> Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusive prospective effect. This ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date, continue to be governed by the law as it was conceived to be before the court gave its ruling.

[23] Back to our own shores, in 2006, the Federal Court had, in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 through the speech by learned Justice Abdul Malek Ahmad FCJ (as he then was), ruled as follows:

> To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level.

[24] Applying the principle distilled from the above-cited cases, it is clearly an undisputed fact that there was no pending appeal pertaining to this case before us. That being the case, it was a case which had, for all intent and purposes been finally disposed of. What was left was the execution of the final judgment which had been the truth between the parties. As such, this case was not affected in any way by the prospective ruling in the *Dr Shamsul Bahar* case *(supra)*. In other words, no prior leave was needed for it to initiate execution proceedings against the second defendant although six years had gone past after judgment was obtained against the second defendant.

[25] We noted that the decision in *Dr Shamsul Bahar*'s case *(supra)* was delivered when this case had not completed its execution proceedings, but at the time when execution was initiated, no leave was required under the then existing regime. It was only out of abundance of caution that the plaintiff had filed in the application for retrospective leave, the *nunc pro tunc* order granted by the High Court sitting at Johore Bahru in favour of the plaintiff. If indeed the learned JC had erred, he had erred on the side of caution and with respect we did not see any miscarriage of justice, let alone substantial miscarriage of justice, being occasioned against the second defendant that would otherwise have warranted us to invoke our appellate powers.

[26] We saw no cogent reasons as to why the decision of learned JC ought to be disturbed. This order was apparently sought in abundance of caution. It is clear that when the bankruptcy proceedings were initiated in 2013, it was within the 12 years allowed under the law on limitation and under the prevailing legal regime then in force, that no leave was required for execution proceedings of a judgment that was obtained against the second defendant more than six years before execution proceedings were initiated against him.

Conclusion

[27] In the upshot therefore, having considered the submissions by both learned counsel, we were unanimous in our decision that this appeal ought to be and is hereby dismissed with costs of RM8,000 as agreed costs subject to payment of allocator fees. Deposit was refunded to the second defendant, being the appellant. We had so ordered.